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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/901,427	07/09/2001	Kevin James Curie	24180-124004	8562
7590	08/24/2004		EXAMINER	DYE, RENA
Matthew E. Leno McDermott, Will & Emery 31st Floor 227 West Monroe Street Chicago, IL 60606			ART UNIT	PAPER NUMBER
			1774	
			DATE MAILED: 08/24/2004	

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/901,427	CURIE ET AL.
	Examiner Rena L. Dye	Art Unit 1774

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 05 March 2004.
- 2a) This action is **FINAL**.                            2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-3,5-19,21-35,37-51,53-67,69-84 and 86-153 is/are pending in the application.
- 4a) Of the above claim(s) 99-126 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-3,5-19,21-35,37-51,53-67,69-84,86-98 and 127-153 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
  1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Status of Claims***

1. Claims 1-3,5-19,21-35,37-51,53-67,69-84 and 86-153 are pending.

Claims 99-126 are withdrawn from consideration.

### ***Claim Objections***

2. Claims 2,3 and 10 are objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claims, or amend the claims to place the claims in proper dependent form, or rewrite the claims in independent form. Claims 2,3 and 10 include the language "adhesive" which has no antecedent basis in claim 1 from which they depend.

### ***Double Patenting***

3. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

4. Claims 1-3,5-19,21-35,37-51,53-67,69-84,86-98, and 127-153 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over

claims 1-52 of U.S. Patent No. 6,677,013. Although the conflicting claims are not identical, they are not patentably distinct from each other because it would have been obvious to one having ordinary skill in the art to have varied the amount of adhesive or maleic anhydride, since maleic anhydride provides the function of adhering the polypropylene to the barrier layer, as recited in the present claims.

5. Claims 1-3,5-19,21-35,37-51,53-67,69-84,86-98, and 127-153 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 21-41 of copending Application No. 10/607,654. Although the conflicting claims are not identical, they are not patentably distinct from each other because it is well known and conventional to one having ordinary skill in the container arts to make a container by stretch, blow molding. Since the present claims teach the identical container structure to that of copending application '654, the recited haze value would have been inherent to that recited in the copending application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### *Specification*

6. The use of the trademarks/names Morton EFM-2E02 (Examples 1 & 3), and Mitsui Admer QB510A (Example 10) has been noted in this application. It is noted that these specific trade names are not defined. They should be capitalized wherever they appear and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

The relationship between a trademark and the product it identifies is sometimes indefinite, uncertain, and arbitrary. The formula or characteristics of the product may change from time to time and yet it may continue to be sold under the same trademark. In patent specifications, every element or ingredient of the product should be set forth in positive, exact, intelligible language, so that there will be no uncertainty as to what is meant. Arbitrary trademarks which are liable to mean different things at the pleasure of manufacturers do not constitute such language. *Ex Parte Kattwinkle*, 12 USPQ 11 (Bd. App. 1931). See MPEP § 608.01(v).

***Claim Rejections - 35 USC § 112***

7. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-3,5-19,21-35,37-51,53-67,69-84,86-98, and 127-153 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Applicant's amendment of the specification, at page 2, lines 9 and 19, "maleic anhydride" sold by Morton International is

deemed to be new matter. In order to avoid the issue of new matter, Applicant should furnish a company brochure or other convincing evidence related to Morton EFM-2E02, which specifically states that the trademark name defines a maleic anhydride.

***Withdrawn Rejections***

9. The rejection of claims 17,21-25,27,30-33,37-41,43,44,46-49,53-57,59-60,62-65,69-73,75,76,78-82,86-90,92,93,95-98,127,129-141, and 143-153 under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement has been withdrawn in view of Applicant's arguments, and the 1.132 Declaration of Dr. Robert Knoll.

10. The rejection of claims 65-67 and 69-81 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention, has been withdrawn in view of Applicant's arguments.

***Claim Rejections - 35 USC § 103***

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3,5-19,21-35,37-51,53-67,69-84,86-98 and 127-153 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wilpers et al. (H1419).

Wilpers et al. teaches that it is an object of his invention to provide polymeric compositions having and exhibiting improved bonding to other incompatible polymeric materials, particularly to polar materials. It is a further object to provide a simple and economical method of bonding incompatible polymeric materials, but further providing a polymeric composition comprising functionalized high melt flow polyolefin (adhesive) and unfunctionalized polyolefin. This composition exhibits improved adhesion to polar materials. Functionalization is accomplished by reacting with a carboxylic acid anhydride, which can be exemplified by maleic anhydride, and is the preferred functional group (column 1, lines 39-55; column 2, lines 47-51). Example 1 illustrates a composition including an unmodified polypropylene with a modified polybutylene (Example 1). The compounds have numerous uses in producing films, molded parts cups, trays and containers. Improved adhesion is exhibited, especially towards polar substrates, such as EVOH copolymer and polyamides (nylons) (column 2, lines 52-59). \*In claim 3, Wilpers specifically recites a polymer composition having and exhibiting improved bonding and printability comprising functionalized polyolefins having a melt flow of up to 1500 g/min., and unfunctionalized polyolefins.

Although Wilpers does not specifically teach the claimed amount of maleic anhydride, it would have been obvious to one having ordinary skill in the art to have varied the amount of maleic anhydride grafted to the polybutylene to have provided varying degrees of adhesion to the polar substrates. Therefore, the amount of maleic anhydride (about 0.01 to about 0.20 percent by weight) would have been known or easily determined by one having ordinary skill in the art since it provides the function of adhering a polypropylene to an EVOH or nylon layer, as does Applicant's claimed invention.

Since Wilpers et al. specifically teaches containers, and it is well known in the art to biaxially stretch containers during the molding process to provide strength, it would have been obvious to one having ordinary skill in the art to have biaxially stretched the container taught by Wilpers et al.

Since Applicant's claimed invention is met by Wilpers et al., it is the Examiner's position that the recited haze value would have been within the scope of the reference, or obvious to one having ordinary skill in the art to have achieved the haze value based upon the teaching of the reference.

As broadly as the invention is recited, the claims would include the blend taught by Wilpers et al. which includes an unmodified polypropylene with a modified polybutylene directly bonded to the EVOH/nylon layer.

***Allowable Subject Matter***

12. After a careful review of the prior art of record the examiner would be willing to allow claims if Applicant's claims were specifically directed to:

(1) A stretch blow molded multilayer container comprising: a first layer defining an outermost/innermost layer of the container and comprising polypropylene; and a second layer comprising an oxygen barrier material, directly adjacent to said first layer; at least one of said first and second layer further comprises maleic anhydride modified polypropylene/adhesive mixed therein to facilitate bonding between the first and second layers, the container having been biaxially stretched and having a haze value of less than approximately 29% measured through a section of the container having a total thickness of greater than approximately 15 mils.

(2) Filed Terminal disclaimers over the related patent US 6,677,013 and application serial no. 10/607,654; and

(3) Overcomes the 112 rejection regarding the use of trade names in the specification.

***Response to Arguments***

13. Applicant's arguments have been carefully considered. In view of Applicant's arguments the Examiner has withdrawn the 112 rejections of record as indicated above, and now indicated allowable subject matter.

With respect to Wilpers, although the percentage of maleic anhydride is not explicitly taught, it would have been obvious to one having ordinary skill in the art to have utilized the recited range since Wilpers teaches that the functionalized polyolefin serves the purpose of adhering a polyolefin and barrier layer. It is also noted that the subject matter of claim 1 and 17 has been indicated as allowed and do not specifically recite the percentage of adhesive. However, since Wilpers specifically teaches that the composition can be used in making molded containers, it would have been obvious to one having ordinary skill in the art to have biaxial oriented the container during molding to have provided additional strength.

Any inquiry concerning this communication should be directed to Rena L. Dye at telephone number 571-272-3186.



Rena L Dye  
SPE: Art Unit 1774

R. Dye  
8/20/04